

**Leap Modulation Sdn Bhd v PCP Construction Sdn Bhd and
another appeal** A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS
W-02(C)(A)-505–03 OF 2017 AND W-02(C)(A)-506–03 OF 2017 B
DAVID WONG, HAMID SULTAN AND RHODZARIAH BUJANG JJCA
3 JULY 2018

*Contract — Building contract — Interim certificates — Claim for payment C
under interim certificates — Claim referred to arbitration under Construction
Industry Payment Adjudication Act 2012 ('the Act') — Adjudicator made
decision in favour of respondent — Whether adjudicator bound to consider defence
not raised in payment response but raised in adjudication response — Whether
adjudicator rightly declined jurisdiction to hear set off pleaded by appellant D
— Whether High Court judge erred in varying and reducing adjudicated sum
— Whether adjudicator's decision should be set aside*

Leap Modulation Sdn Bhd ('the appellant') had appointed PCP Construction E
Sdn Bhd ('the respondent') as the main contractor of a construction project in
Jalan Aman Damai, Kuala Lumpur. A dispute arose between the parties over
the non-payment of interim payment claims. The respondent, as the unpaid
party, initiated a claim for interim payment under the Construction Industry
Payment Adjudication Act 2012 ('the Act') for the sum of RM1,821,680.60,
which was based on two interim certificates (Nos 17R and 18) and served the F
same on the appellant. In its payment response the appellant denied the
respondent's claim on the ground that it was entitled to set offs from the
respondent for certain defaults in executing the construction. The appellant
submitted that the works had not been properly carried out by the respondent
and claimed compensation for breach of contract and damages for remedial G
work without providing details of the costs incurred in respect of the remedial
works. The respondent proceeded to serve a notice of adjudication on the
appellant seeking payment under interim certificate Nos 17R and 18
amounting to RM1,930,981.43. The appellant in its adjudication response
explained that it was seeking a set off in relation to the claim related to payment H
certificates Nos 17R and 18, with a more complete breakdown of the costs it
sought to set off, including interim certificate No 19 for the sum of
RM351,646.68. Guided by the decision of the High Court in *View Esteem Sdn
Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22 ('the *View Esteem* case'), the
adjudicator hearing the case found that in adjudication the pleadings were to I
be found in the payment claim and payment response, and not the
adjudication claim, adjudication response or the adjudication reply. The
adjudicator therefore held that since the matters claimed by the respondent as
a set off had not been raised in its payment response, she was not able to

A consider the set off claims. The adjudicator also went on to hold that she would have allowed the set off claimed by the appellant under interim certificate No 19 for the sum of RM351,646.68, if she were allowed to deal with it. The adjudicator thus allowed the sum claimed by the respondent of RM1,930,981.43, with no set off. The appellant appealed to the High Court.

B The High Court judge found that the adjudicator had rightly declined jurisdiction to hear the set off pleaded by the appellant. However, the judge found that the set off claimed by the appellant under interim certificate No 19 should have been considered by the adjudicator. As such, the High Court judge severed that part of the award and allowed the set off amount of

C RM351,646.68, thereby reducing the adjudicated sum to RM1,579,334.75. Subsequent to the decision of the judge, the Federal Court delivered its judgment in the *View Esteem* case, which was the Federal Court's first judgment on the Act. The Federal Court held, inter alia, that an adjudicator was fully

D entitled to consider defences not raised in the payment response but raised in the adjudication response. The appellant thus initiated the present appeal and contended that the arbitrator's failure to consider defences raised in the adjudication response amounted to a breach of natural justice. The respondent however submitted that there had not been any breach of natural justice and

E even if there was, the breach was not so material which would warrant the court to set aside the adjudication award.

Held, allowing the appeal with no order as to costs:

- F (1) In the light of the prevailing practice in the adjudication industry, the adjudicator had applied the law as it existed then when she refused jurisdiction to hear the set off claims in the appellant's adjudication response. Further, the numerous provisions in the Act were crafted in a manner to facilitate the adjudicator to deliver justice in a speedy and
- G economic manner. Thus, taking into consideration the underlying purpose of the Act and the fact that adjudication awards were of a 'temporary finality' in nature, there was some merit in the position taken by the respondent that the appellant had not suffered material and permanent prejudice by the adjudicator's refusal to examine the set off
- H claims (see paras 25–27).
- I (2) However, in view of the concept of stare decisis, which would apply in the present case, this court was bound by the decision of the Federal Court in the *View Esteem* case. The proposition distilled from the Federal Court's decision in the *View Esteem* case was that a failure by an adjudicator to consider defences, though not set out in the payment response, but in the adjudication response, amounted to a breach of natural justice. This meant that the award of the adjudicator in the present case had to be set aside (see paras 28–29 & 31).

[Bahasa Malaysia summary]

Leap Modulation Sdn Bhd ('perayu') telah melantik PCP Construction Sdn Bhd ('responden') sebagai kontraktor utama projek pembinaan di Jalan Aman Damai, Kuala Lumpur. Pertikaian timbul antara pihak-pihak berhubung tuntutan-tuntutan bayaran interim yang tidak dibayar Responden, sebagai pihak yang tidak dibayar, telah memulakan tuntutan untuk bayaran interim di bawah Akta Adjudikasi Pembayaran Industri Pembinaan 2012 ('Akta') untuk jumlah RM1,821,680.60, yang berdasarkan dua sijil interim (No 17R dan No 18) dan menyampaikan yang sama ke atas perayu. Dalam maklum balas berhubung pembayaran itu, perayu menafikan tuntutan responden dengan alasan bahawa ia berhak membuat penepian daripada responden kerana kegagalan tertentu dalam melaksanakan pembinaan itu. Perayu telah berhujah bahawa kerja-kerja itu tidak dilaksanakan dengan baik oleh responden dan menuntut ganti rugi kerana melanggar kontrak dan ganti rugi untuk kerja pemulihan tanpa memberi butir-butir mengenai kos yang ditanggung berkenaan dengan kerja pemulihan itu. Responden telah meneruskan untuk menyampaikan notis adjudikasi kepada perayu memohon bayaran di bawah sijil interim No 17R dan 18 berjumlah RM1,930,981.43. Perayu dalam tindak balas adjudikasi menjelaskan bahawa ia memohon penepian untuk tuntutan berkaitan sijil pembayaran No 17R dan 18, dengan pecahan yang lebih lengkap untuk kos yang dipohon untuk penepian, termasuk sijil interim No 19 untuk jumlah RM351,646.68. Berpandukan keputusan Mahkamah Tinggi dalam kes *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22 ('kes *View Esteem*'), adjudikator yang mendengar kes itu mendapati bahawa dalam penghakiman, pliding itu didapati dalam tuntutan pembayaran dan pembayaran pembayaran, dan bukan tuntutan adjudikasi, maklum balas adjudikasi atau jawapan adjudikasi. Oleh itu, adjudikator berpendapat bahawa oleh kerana perkara yang dituntut oleh responden sebagai penepian tidak dibangkitkan dalam tanggapan pembayarannya, beliau tidak dapat mempertimbangkan tuntutan yang ditolak. Adjudikator juga seterusnya memutuskan bahawa beliau mungkin akan membenarkan penepian yang dituntut oleh perayu di bawah perakuan interim No 19 untuk jumlah RM351,646.68, jika beliau dibenarkan berurusan dengannya. Adjudikator oleh itu membenarkan jumlah yang dituntut oleh responden sebanyak RM1,930,981.43, tanpa penepian. Perayu telah merayu kepada Mahkamah Tinggi. Hakim Mahkamah Tinggi mendapati bahawa adjudicator adalah betul kerana menolak bidang kuasa untuk mendengar penepian yang dipli oleh perayu. Walau bagaimanapun, hakim mendapati bahawa penepian yang dituntut oleh perayu di bawah sijil interim No 19 sepatutnya dipertimbangkan oleh adjudikator. Oleh demikian, hakim Mahkamah Tinggi telah memotong bahagian award itu dan membenarkan jumlah penepian sebanyak RM351,646.68, dengan itu mengurangkan jumlah diadili kepada RM1,579,334.75. Berikutan keputusan hakim, Mahkamah Persekutuan menyampaikan penghakimannya dalam kes *View Esteem*, yang merupakan

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- A penghakiman pertama Mahkamah Persekutuan berhubung Akta tersebut. Mahkamah Persekutuan telah memutuskan, antara lain, seorang adjudikator berhak sepenuhnya untuk mempertimbangkan pembelaan yang tidak dibangkitkan dalam maklum balas pembayaran tetapi dibangkitkan dalam maklum balas adjudikasi. Perayu dengan itu telah memulakan rayuan ini dan
- B menegaskan bahawa kegagalan penimbang tara untuk mempertimbangkan pembelaan yang dibangkitkan dalam maklum balas adjudikasi adalah merupakan suatu pelanggaran keadilan asasi. Walau bagaimanapun, responden mengemukakan bahawa tiada pelanggaran keadilan asasi dan malah jika berlaku, pelanggaran itu tidak begitu material sehingga mewajarkan
- C mahkamah untuk mengetepikan penghakiman adjudikasi itu.

Diputuskan, membenarkan rayuan tanpa perintah untuk kos:

- (1) Berdasarkan amalan semasa dalam industri adjudikasi, adjudikator telah
- D mengguna pakai undang-undang sebagaimana ia wujud ketika itu apabila beliau menolak bidang kuasa untuk mendengar tuntutan penepian dalam maklum balas adjudikasi perayu. Selanjutnya, banyak peruntukan dalam Akta tersebut telah digubal dengan cara untuk memudahkan adjudikator untuk menyampaikan keadilan secara cepat dan ekonomi. Oleh itu, dengan mengambil kira tujuan dasar Akta
- E tersebut dan hakikat bahawa award adjudikasi adalah bersifat 'temporary finality', terdapat merit dalam kedudukan yang diambil oleh responden bahawa perayu tidak mengalami prasangka material dan kekal akibat keengganan adjudikator untuk memeriksa tuntutan penepian tersebut (lihat perenggan 25–27).
- F (2) Walau bagaimanapun, memandangkan konsep stare decisis, yang akan diguna pakai dalam kes ini, mahkamah ini terikat dengan keputusan Mahkamah Persekutuan dalam kes *View Esteem*. Cadangan yang dinyatakan dalam keputusan Mahkamah Persekutuan dalam kes *View Esteem* adalah bahawa kegagalan oleh seorang adjudikator untuk mempertimbangkan pembelaan, walaupun tidak dinyatakan dalam maklum balas pembayaran, tetapi dalam maklum balas adjudikasi, merupakan pelanggaran keadilan asasi. Ini bermakna bahawa award adjudikator dalam kes ini perlu diketepikan (lihat perenggan 28–29 & 31).]
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Notes

For cases on interim certificates, see 3(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4318–4319.

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Cases referred to

Metropole Pte Ltd v Designshop Pte Ltd [2017] 4 SLR 277; [2017] SGHC 45, HC (refd)
Primus Build Ltd v Pompey Centre Ltd and anor [2009] All ER (D) 14

(Jul); [2009] EWHC 1487 (TCC), QBD (refd) A
View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2018] 2 MLJ 22; [2017] 1
LNS 1378, FC (folld)
Watpac Constructions v Austin Corp [2010] NSWSC 168, SC (refd)

Legislation referred to B

Construction Industry Payment and Adjudication Act 2012 ss 10, 15,
27(1), 37

Appeal from: Originating Summons Nos WA-24C-170–12 of 2016 and
WA-24C-9–01 of 2017 (High Court, Kuala Lumpur) C

**Editorial Note: As directed by court order, the dissenting judgment dated
3 July 2018 has been removed. The content may differ from the first print
edition.**

*Alan Wong (Andrew Heng and Roger Leong with him) (Zain Megat & Murad) for
the appellant.* D

*Phang Soon Mun (Chew Chun Wei with him) (Han & Partners) for the
respondent.*

David Wong JCA (delivering majority judgment of the court): E

INTRODUCTION

[1] There are two appeals before us. Appeal W-02(C)(A)-505–03 of 2017
(‘Appeal 505’) relates to the decision of the High Court where the learned judge
dismissed the appellant’s/plaintiff’s application to set aside the learned
adjudicator’s decision where a sum of RM1,579,334.75 was awarded to the
respondent. F

[2] The learned judge also allowed the enforcement application of the
learned adjudicator’s award of RM1,579,334.75 and Appeal W-02(A)-506–03
of 2017 (‘Appeal 506’) concerns the aforesaid decision. G

[3] We heard the appeals together and had reserved our decision. We have
since further considered submissions from respective counsel and now give our
decision and grounds. H

BACKGROUND FACTS

[4] The respondent was appointed by the appellant as the main contractor
for a contract sum of RM65m in respect of a project known as ‘Proposed
Construction of 1 Commercial Block of 29 storeys’ consisting of: (i) 22 floors
of office units (473); one floor of facilities; (ii) five podium floors of car parks; I

A (iii) two floors of basement car parks; and (iv) one floor for mechanical on Lot 41096, Jalan Aman Damai, Mukim Petaling, Kuala Lumpur.

B [5] The respondent, being the unpaid party, made a claim under the CIPPA 2012 for payment under interim certificate No 17R and No 18 for the sum of RM1,821,680.60. As required by CIPPA 2012, the respondent served on the appellant, being the non-paying party, a payment claim on 22 January 2016.

C [6] In response, the appellant filed its payment response which in the words of the learned judge is a document ‘not drafted elegantly in legal language’ but in substance denied the claim of the respondent on the ground that it was entitled to compensation from the respondent’s default in executing the construction contract in that works were not properly done resulting in remedial works to complete the same. No details of the amount incurred for the remedial works by the appellant were set out in the payment response.

E [7] Notice of adjudication was served by the respondent on the appellant on 13 July 2016 seeking payment under interim certificate Nos 17R and 18 amounting to RM1,930,981.43 (inclusive of GST). The learned adjudicator was then appointed on 29 August 2016.

F [8] The respondent on 26 September 2016 served the adjudication claim with supporting documents, details of which are set out in the learned adjudicator’s grounds (refer to pp 8–11 of common core bundle).

G [9] In response, the appellant filed its adjudication response with supporting documents, details of which are also set out in the learned adjudicator’s grounds (refer to pp 11–20 common core bundle). From the adjudication response, one can distil that there are basically two grounds of defence and they are:

1. The Appellant is entitled to set off the amount claimed by the Respondent with the following amounts:
 - H** (a) Outstanding amount of RM351,646.68 certified under interim Certificate No 19.
 - (b) Structural defects investigation and audit cost of RM161,839.50.
 - (c) Additional costs of completion of RM6,860,842.45.
 - I** (d) Associated costs amounting to RM1,624,841.11.
2. Premised on clause 25.4(iv) of the contract documents, as the Appellant had terminated the contract no payment is due until the completion of works and until the completion and verification of the accounts within a reasonable time by the Architect certifying that there are outstanding

amount to the claimant (in this case the Respondent) after taking into account the costs of completing the remaining works.

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[10] Before the learned adjudicator, she had to resolve the issue of whether she had the jurisdiction to deal with the claims of set off by the appellant as set out in the adjudication response when these set off were not specifically pleaded in the payment response. This was how she dealt with it as can be seen in the following paragraphs in her grounds:

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(a) para 42:

At the outset, I am mindful that my jurisdiction as an adjudicator under CIPAA as provided in s 27(1) of the CIPAA, is limited to the matters referred to adjudication by the parties pursuant to ss 5 and 6 of CIPAA. On the extent and construction of s 27(1) and therefore the matters that I have jurisdiction of, I look to the learned High Court Judge's judgment in *View Esteem Sdn Bhd v Bina Puri Holdings Sdn Bhd* [2015] MLJU 695; [2017] 1 CLJ 677 for guidance. That firstly, the parties are bound by their pleadings under the rules of procedure in civil litigation; in adjudication, those pleadings are to be found in the payment claim and payment response, and not the adjudication claim, adjudication response or the adjudication reply. That secondly, because adjudication is intended to provide a speedy resolution of the payment dispute, the adjudicator cannot be expected to deal with issues, legal and/or factual, which may still be evolving or in the making as the adjudicator sits down to determine the dispute.

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(b) para 64:

As is clear from Justice Mary Lim's judgment (as she then was) in the cases of *View Esteem and WRP Asia Pacific*, my jurisdiction as adjudicator are restricted to the matters found in the ss 5 and 6; that the adjudication takes jurisdiction from the payment claim and payment response, not from the adjudication claim, response or reply. This is materially significant and important as this brings to bear the whole scheme of the CIPAA; that the adjudication proceedings is to deal with or resolve a payment dispute. My sole task as an adjudicator is to resolve the dispute between the parties arising from the payment claim and payment response. As Justice Mary Lim said in her judgment in *WRP Asia Pacific's* case, my sole task is to resolve the dispute for the reasons already made known between the parties and nothing else ...

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(c) para 66:

Whilst I could appreciate this, s 27(1) of the CIPAA and the cases are clear on my role as an adjudicator. My jurisdiction is limited to the matters as raised in the payment claim and payment response. To be more specific, my role as an adjudicator is to resolve the dispute for the reasons already made known between the parties and nothing else. I am therefore bound by s 27(1) of the CIPAA and given that the matters claimed by the respondent as a set off/deduction have not been raised in its payment response, I am not able to consider the set off ...

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- A** [11] The learned adjudicator however saw the injustice if she were not to deal with the set off amount of RM351,646.68 certified under interim certificate No 19. She then took the ‘for the sake of completeness approach’ by saying that if she were allowed to deal with the aforesaid set off, she would have allowed it.
- B** HIGH COURT
- C** [12] The learned judge in the very first paragraph of his judgment sets out the crucial issue by determination for him and that was simply whether the learned adjudicator had rightly declined jurisdiction to hear the set off pleaded by the non-paying party and the related issue as to whether the court may allow part of the set off that should have been heard by the learned adjudicator and so reduce the adjudicated sum accordingly.
- D** [13] The learned judge agreed with the learned adjudicator in regard to the three items of claim for structural defects investigation and audit costs, additional costs of completion and associated costs on the ground that those claims were not properly pleaded as set off.
- E** [14] However, in regard to the claim of RM351,646.68 from the interim certificate No 19 against payment of payment certificate Nos 17R and 18, the learned judge disagreed with the learned adjudicator and in our view for good reason. It is undisputed that interim certificate No 19 was issued on 19 January 2016 before the service of the payment claim by the respondent on 22 January 2016. Hence the learned Judge was correct to say that even if the respondent had missed that, it should have been completely candid and disclosed it in its adjudication claim as certificate No 19 is a follow-up and continuing from certificate No 18.
- F**
- G** [15] The learned judge in his own words put it this way:
- H** [69] As I had pointed out, it is not quite correct to say that the set off and deduction had not been pleaded at least where the negative certification of the Architect in Certificate No 19 is concerned that comes up under the rubric of the ‘compensation that the Respondent was seeking for all losses caused by the Claimant ...’ The actual words of ‘set off or cross claim’ need not have to be used; only the reasons for disputing the claim.
- I** [70] I would therefore hold that the adjudicator had wrongly and unduly diminished and restricted her jurisdiction to hear the set off in Certificate No 19 certified by the Architect ...
- ...
- [81] I am therefore constrained to find that there was nevertheless a breach of natural justice when the Adjudicator failed to exercise and assume jurisdiction to

hear and allow the set off of rectification costs pleaded in the Payment Response and more precisely referred to in the Adjudication Response in Payment Certificate 19 being a negative Certificate

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[16] Premised on the above, the learned judge then severed that part of the award of the learned adjudicator and allowed the set off amount of RM351,646.68 from the adjudicated sum of RM1,930,981.43 resulting in a reduced amount of RM1,579,334.75.

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OUR GROUNDS OF DECISION

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[17] Subsequent to the decision of the learned judge, the Federal Court delivered its first judgment on the CIPAA 2012 on 6 November 2017 in the case of *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22; [2017] 1 LNS 1378 where the following questions of law were considered:

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(1) Whether a jurisdictional challenge as to the application of the Construction Industry Payment and Adjudication Act 2012 ['CIPAA'] can be made any time by way of application or whether such an application can only be made upon the application to set aside an Adjudication Award under section 15 of the CIPAA;

(2) Whether section 41 of the CIPAA operates to exclude any proceedings from the operation of the CIPAA if the whole or any part of such a claim has been brought to court or Arbitration prior to the coming into force of the CIPAA;

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(3) Whether section 6(4) of the CIPAA allows a responding party to raise matters not raised in Payment Response under section 6(2) of the CIPAA during the filing of the Adjudication Response under section 10(1) of the CIPAA;

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(4) If the answer to question (3) above is in the affirmative, whether the exclusion of a defence that has not been raised in the Payment Response under section 6(4) but raised under section 10(1) of the CIPAA amounts to a denial of natural justice under section 15 of the CIPAA;

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(5) Whether the adjudicator has the power under section 26 of the CIPAA to remedy any non-compliance with section 6(2) of the CIPAA;

(6) If the answer to question (5) is in the affirmative, whether the exclusion of a defence that has not been raised in the Payment Response under section 6(4) but raised under section 10(1) of the CIPAA amounts to a denial of natural justice under section 15 of the CIPAA;

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(7) Whether an application for stay or partial stay on terms under section 16 of the CIPAA can be granted to remedy an injustice caused by a breach of natural justice or errors arising in an adjudication award; and

(8) Whether an application for a stay under section 16 of the CIPAA can be made concurrently with an application to set aside an award under section 15 of the CIPAA or whether an application for a stay under section 16 of the CIPAA can only be made after an application to set aside an award under section 15 of the CIPAA is made.

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- A** [18] Of relevance to this appeal is how the Federal Court had dealt with the question of whether an adjudicator was excluded from considering defences not raised in the payment response but raised in the adjudication response under s 10 of the CIPAA 2012 and if no whether such failure to consider those defences would amount to a breach of natural justice.
- B**
- [19] The Federal Court in no uncertain terms opined that an adjudicator is fully entitled to consider defences not raised in the payment response but raised in the adjudication response and the rationale is this:
- C** [38] The adjudicator justified the right to exclude for consideration three defences as they were not stated as reasons in the first payment response under s 6 of the CIPAA, though pleaded in the adjudication response before him under s 10 of the CIPAA. The adjudicator had evidently excluded the defences, relying on s 27(1) of the CIPAA, as a matter of jurisdiction. Section 27(1) reads as follows:
- D** 27 Jurisdiction of adjudicator
- (1) Subject to subsection (2), the adjudicator's jurisdiction in relation to any dispute is limited to the matter referred to adjudication by the parties pursuant to sections 5 and 6.
- E** ...
- [43] It should also be noted that while the payment response under s 6(2) of the CIPAA requires the non-paying party to merely state 'amount disputed and the reasons for the dispute' the adjudication response under s 10 of the CIPAA on the other hand requires the respondent to 'answer the adjudication claim'. The latter, is in our view is in the nature of a legal response with the obligation to 'answer' imposed by a statute, to mean a real opportunity to defend a claim, and not something illusory.
- F**
- [44] It should be noted that on the claimant's side, the adjudication claim under s 9(1) of the CIPAA requires the unpaid party to state 'the nature and description of the dispute and the remedy sought' whereas the preceding payment claim under s 5 of the CIPAA merely requires him to state the amount claimed and the contract involved sufficient to 'identify the cause of action'.
- G**
- [45] It needs to be emphasised here that the adjudication response under s 10(1) of the CIPAA requires the non-paying party to 'answer the adjudication claim' meaning the 'nature and description of the dispute and the remedy' as claimed by the claimant in its adjudication claim. It is also significant to note that it is at this stage of the proceedings that the unpaid party is termed by the CIPAA as 'the claimant', and the non-paying party as 'the respondent', by which terms they are thereafter respectively referred to. It comes about after the 'initiation of adjudication' under s 8 of the CIPAA where an adjudicator is appointed signifying the start of the adjudication process. The adjudication pleadings under ss 9–11 of the CIPAA comes after this and before the adjudication hearing begins under s 12 of the CIPAA.
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[46] We are of the considered view that the scheme of the two stage process under CIPAA does not warrant giving a reduced importance to the adjudication pleadings and a greater, if not overriding, significance given to the initial documents under sections 5 and 6 of CIPAA.

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[74] For the reasons above stated it is our considered view that an adjudicator is not excluded from considering all the defences raised by a respondent in the adjudication response whether found in the first response under s 6 of the CIPAA or not. In the circumstances of this case, the adjudicator had acted in breach of natural justice in excluding and refusing to consider certain defences raised by the appellant, and his decision cannot stand for that reason.

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[20] Naturally learned counsel for the appellant submits that the Federal Court decision in *View Esteem* is applicable to the present appeal. To recapitulate, the factual matrix is that the learned adjudicator had applied s 27(1) of the CIPAA 2012 to exclude the four items for consideration. That was what was done by the learned adjudicator in the *View Esteem* case as well. What they did and the reasons for their actions, we concede, were proper and correct as the law as it stood then was to apply the plain meaning of the words in s 27(1) of the CIPAA 2012.

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[21] Learned counsel for the respondent however submitted that in this case there has not been any breach of natural justice and even if there were, the breach was not so material which would warrant the court to set aside the adjudication award. Learned counsel then took the court through the positions in this country, Singapore, England and Australia.

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[22] The Singapore position is encapsulated in the case of *Metropole Pte Ltd v Designshop Pte Ltd* [2017] 4 SLR 277; [2017] SGHC 45, where the Singapore High Court made the following observations at para 67:

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- (a) That an arbitration and adjudication is different in the sense that an arbitrator's award has full finality whereas adjudicator's determination has only temporary finality;
- (b) The fact that an adjudicator's determination has temporary finality would mean that there is a less reason for Court to intervene in adjudication in an application to set aside adjudication for breach of natural justice as parties have occasion in future to have that dispute resolved with full finality and in compliance with rules of natural justice;
- (c) That there is even less reason for the court to intervene if the breach of natural justice is immaterial to the outcome of the adjudication or has occasioned aggrieved party no prejudice; and

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- A (d) In view that the adjudicator's breach of the audi alteram partem rule was not sufficiently material so as to cause any prejudice whatsoever. It is therefore insufficient to warrant setting aside the adjudication determination.
- B The English position is reflected in the case of *Primus Build Ltd v Pompey Centre Ltd and anor* [2009] All ER (D) 14 (Jul); [2009] EWHC 1487 (TCC) (Tab 8 RBA), where Coulson J held that:
- C [29] Generally speaking, the rules of natural justice apply to adjudication, but they cannot always be fully applied, given the short timetable and 'the crude methodology' sometimes involved: see *Balfour Beatty Construction Ltd v London Borough of Lambeth* [2002] EWHC 597. Any alleged breach must be examined critically (*Amec Capital Projects Ltd v Whitefriars City Estates Ltd* [2005] BLR 1) and must be material or of significance to the decision actually made by the adjudicator: see *Kier Regional Ltd (It/a Wallis) v City & General (Holborn) Ltd* [2006] EWHC 848 TCC and *Cantillon Ltd v Urvasco Ltd* [2008] EWHC 282 TCC. In other words, if there has been a breach of natural justice, but it cannot be demonstrated that it goes to the heart of the adjudicator's decision, it will not affect the enforcement of that decision.
- D
- E [23] The position of the Australian courts is no different and this can be seen in the case of *Watpac Constructions v Austin Corp* [2010] NSWSC 168, where the Supreme Court of New South Wales said as follows:
- F [141] Hodgson JA discussed natural justice, in the scheme of the Act, in Brodyn at 441–442 [55]. His Honour said in that paragraph that an adjudication determination will be void if, among other things, 'there is a substantial denial of the measure of natural justice that the Act requires to be given'.
- G [142] Any entitlement to natural justice must accommodate the scheme of the Act, including the extremely compressed timetable provided for the submission of payment schedules, adjudication applications, and adjudication responses; and the limited time (subject to the consent of the parties, which they may give or withhold at their will) for an adjudicator to determine an application. It must also accommodate the fact that, in many cases, claimants and respondents will prepare their documents themselves, and will not avail themselves of legal advice in doing so.
- H ...
- I [145] I see no reason to depart from those views; and neither party submitted that I should. In particular, I think, my insistence on materiality is consistent with the reference by Hodgson JA in Brodyn to 'substantial denial ... of natural justice'.
- [146] In this context, Gleeson CJ said in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at 13–14 [37] that fairness is not abstract but practical. His Honour said that '[w]hether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice'. To like effect, Kirby J said in *Minister for immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 291 that the court should not undertake the task of 'combing through the words of the decision-maker with a fine appellate

- tooth-comb [sic], against the prospect that a verbal slip will be found warranting' the intervention of the court. A
- [147] I accept, however, that the court should not be too ready to find that a denial of natural justice was immaterial; that it had no real or practical effect; or that (in the present context) there was nothing that could have been put on the pint in question. But it remains the case, I think, that the denial of natural justice must be material, and that submissions that could have been put might have had some prospect of changing the adjudicator's mind on the point. B
- [24] The Malaysian position adopts the English position as is reflected from the learned and much respected judgments of Mary Lim J (now JCA) and Lee Swee Seng J, the first and present custodian of the Kuala Lumpur Construction Court. C
- [25] Premised on the above, learned counsel submitted that the learned adjudicator was correct in refusing to adjudicate the three items of claim of set off as those claims were then still evolving and could and more properly be pursued in arbitration or litigation. Further it was also submitted that in view of the timeline prescribed by the CIPAA 2012 for completion of an adjudication, it would not be possible for the learned adjudicator to finish the adjudication within the statutory timeline. Reliance was made to the learned High Court judge's judgment in *View Esteem* where Mary Lim J (now JCA) said as follows: D
- [64] Because adjudication is intended to provide a speedy resolution originating summons that payment dispute within the time lines found in s 12, where an adjudication decision rendered outside the prescribed time lines is void unless extended by the written consent of the parties, the adjudicator cannot be expected to deal with issues, legal and/or factual, which may still be evolving or in the making as the adjudicator sits down to determine the dispute. Unrestricted arguments may unnecessarily prolong or even protract adjudication proceedings rendering the whole process impractical, inefficient or unwieldy. There should be certainty in the issues or matters that any party is expected to face in the adjudication proceedings so that the rules of fair play can be readily met. That cannot possibly be achieved if issues or matters are still or yet to be identified. E
- [26] We have no doubt that the learned adjudicator had applied the law as it existed then when she refused jurisdiction to hear the three items of set off in question. Hence, we could not fault her for what she did. We are also not in doubt that the prevailing practice in the adjudication industry was as practiced by the learned adjudicator. The rationale behind CIPPA 2012 is simply to have a regime for speedy and accessible justice to ensure cash flow in our vital construction industry. Hence, we find in CIPPA 2012 numerous provisions crafted in a manner to facilitate the adjudicator to deliver justice in a speedy and economic manner. This is prevalent and reflected in s 15 of the CIPPA F
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A 2012 which provides only four grounds upon which one can set aside an award of an adjudicator.

B [27] Taking into consideration of the underlying purpose of CIPPA 2012 and the fact that adjudication awards are of a ‘temporary finality’ in nature, we see some merit in the position taken by the respondent that the appellant had not suffered material and permanent prejudice by the learned adjudicator’s refusal to examine the three items of set off as the same could have been resolved in litigation as well as in arbitration as allowed by s 37 of the CIPPA 2012.

C [28] That said and whatever our views may be, the concept of stare decisis applies here. We, as the Court of Appeal, are bound by the decision of the apex court of the land. The proposition distilled from the Federal Court decision in D *View Esteem* is simply that a failure by an adjudicator to consider defenses, though not set out in the payment response, but in the adjudication response, amounted to a breach of natural justice which would dictate that the award of the adjudicator be set aside.

E [29] There is no two ways about it here. The concept of stare decisis is applicable to the case at hand as the factual matrix there in our view is the same as here and could not be distinguished in anyway. We are thus bound by it, irrespective what our view may be.

F CONCLUSION

G [30] It appears that the Federal Court had taken a more robust stand in its supervisory role in the CIPPA 2012 cases bordering on the role of an appellate court as one might put it. This is reflected in their view on the principles applicable in an application for stay of an adjudication award. Prior to the Federal Court’s pronouncement, the approach of the courts had been restrictive in that granting stay is given only in exceptional and special circumstances which is restricted by the test of the financial capacity of the winning party at the adjudication process to repay the sum awarded in the event the adjudication award is set aside. The Federal Court rejected the restrictive approach and opined that the court should be given some degree of flexibility in stay application ‘where there are clear errors, or to meet the justice of the individual case’. The Federal Court’s departure from the restrictive approach as practiced in other jurisdictions as in Australia, England and H Singapore is rationalised on the fact that in these jurisdictions, the adjudication legislative regime contains review and challenges to the adjudicator’s decision which must be exhausted before any application is made to the courts, but I which thr CIPPA 2012 does not have. Hence in those jurisdictions, applications for stay of the adjudications awards are rarely granted.

[31] Finally, we reiterate that the importance of the doctrine of stare decisis must not be overlooked. As Benjamin Cardozo in his treatise, *The Nature of Judicial Process* (New Haven and London: Yale University Press 1921) at p 9-50, says:

It will not do to decide the same questions one way between one set of litigants and the opposite way between another. 'If a group of cases involves the same point, the parties expect the same decision. It would be a gross injustice to decide alternate cases on opposite principles. If a case was decided against me yesterday when I was a defendant, I shall look at the same judgment today if I am plaintiff. To decide differently would raise a feeling of resentment and wrong in my breast; it would be an infringement, material and moral, of my rights'. Adherence to precedent must then be the rule rather than an exception if litigants are to have faith in the even-handed administration of justice in the Courts.

[32] For reasons stated above, we allow the appeals with no order as to cost. We consequently, we also set aside the orders of the High Court and that of the adjudicator. We further order that the deposits be refunded.

Appeal allowed, with costs.

Reported by Kohila Nesan

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Editorial Note:

**Notification of removal of content for Leap Modulation Sdn Bhd v
PCP Construction Sdn Bhd and another appeal [2019] 1 MLJ 334**

Kindly note, as directed by court order, the dissenting judgment dated 3 July 2018 in the case bearing citation [2019] 1 MLJ 334 has been removed (pages 349–378).

The amendment will be reflected on our online platform as well as the revised PDF attachment of the case. Our apologies for any inconvenience caused.

16 March 2019